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Supreme Court of the United States

October Term, 1946.

No. 300.

LILLIAN B. EVERETT, - - - - - - Petitioner,

versus

WALLIS W. DOWNING, - - - - - - Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LOUIS SEELBACH,
Counsel for Respondent.

BULLITT & MIDDLETON,
Of Counsel.

Louisville, Ky.,
August 17, 1946.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

October Term, 1946.

No. 300.

LILLIAN B. EVERETT, - - - - *Petitioner,*

v.

WALLIS W. DOWNING, - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits that the prayer of the petitioner for the issuance of writ of certiorari to the Court of Appeals of Kentucky should not be granted in the above-styled action.

The petition for writ of certiorari was filed in the office of the Clerk of the Supreme Court on July 15, 1946, and no copy of the record of proceedings in the Court of Appeals of Kentucky has been filed. On behalf of respondent we have procured and filed with the Clerk of the United States Supreme Court a cer-

tified copy of orders entered in the action by the Court of Appeals in Kentucky.

We respectfully submit that the Supreme Court of the United States is without jurisdiction for two reasons:

1. The petition for writ of certiorari was filed too late.
2. No Federal question is involved.

We will deal briefly with these objections in the order raised.

1. Petition Was Filed Too Late.

Title 28, United States Code, §350, reads in part as follows:

> "No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, * * *."

The remainder of the section is not pertinent to our situation.

The trial of the case of Everett v. Downing in the Jefferson Circuit Court at Louisville, Kentucky, resulted in a directed verdict for the respondent. It is shown in the copy of the orders in the Kentucky Court of Appeals that on June 20, 1944, in the Spring Term, that Court affirmed the judgment of the Jefferson Circuit Court. It is further shown that on September 18,

1944, in the Fall Term of the Court of Appeals of Kentucky, this petitioner filed a petition for rehearing and that on October 3, 1944, the Court of Appeals of Kentucky overruled this petitioner's application for a rehearing.

Orders of the Court of Appeals of Kentucky show that no other action was taken by the petitioner until September 17, 1945, when the petitioner offered to file another petition for rehearing, and that on September 28, 1945, the Court of Appeals of Kentucky dismissed such petition for rehearing for want of jurisdiction.

Again on July 15, 1946, the Court of Appeals of Kentucky directed the Clerk of that Court not to make up a record for the purpose of appeal in *forma pauperis* to the Supreme Court of the United States because the petitioner was not in time for an appeal.

The Civil Code of Practice of the State of Kentucky, Section 760, provides, in substance, that no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered.

The Kentucky Revised Statutes, Section 21.090 authorizes the Court of Appeals of Kentucky to fix the terms of Court and reads as follows:

> "There shall be three terms of court in each year. The court shall, by order, declare what shall be regarded as a term, or the commencement or end of a term. The court shall be held every juridical day in each year, except in the months of July and August, if necessary to dispose of the

> business before it; but if, at any time, a majority of the judges are unavoidably absent, the court shall stand adjourned until a quorum can be had."

The Court of Appeals of Kentucky has adopted the following as RULE II:

> 1. TERMS OF COURT. Three terms of court will be held each year, to be known as the winter, spring and fall terms beginning respectively on the first Monday in January, the second Monday in April and the third Monday in September. When the first Monday in January falls on the first day of January, the term will begin on the next day. There will be a two weeks' vacation at the close of the winter and fall terms, respectively. The spring term will close on the Friday following the third Monday in June."

The Court of Appeals of Kentucky has held that when it has passed upon the record, and then upon a petition for rehearing, if one has been presented, and the term has adjourned, the cause is wholly beyond its reach.

Beazley v. Mershon, 69 Ky. 424, at page 427.

It follows from the foregoing authorities that the decision of the Court of Appeals of Kentucky in the case of Everett v. Downing became final on October 3, 1944. Certainly after the end of the 1944 Fall Term, the Court of Appeals of Kentucky lost all power over its decision and judgment in the case.

Under Title 28, United States Code, §350, the petitioner had three months from October 3, 1944, to file

a petition for a writ of certiorari in this Court. She did not attempt to file such petition until July 15, 1946, and is therefore too late.

2. No Federal Question Was Ever Raised in the Lower Court.

As heretofore stated, this cause was tried in the Jefferson Circuit Court at Louisville, Kentucky, and resulted in a directed verdict for the respondent. The case was affirmed by the Court of Appeals of Kentucky and a petition for rehearing was overruled. We will not attempt to go into the facts of the case, as both the facts and the law are set forth in the opinion of the Court, reported in Everett v. Downing, 298 Ky. 195, 182 S. W. (2d) 232.

At no time, in the Jefferson Circuit Court or in the Court of Appeals of Kentucky, either on the original appeal or on the petition for rehearing, was there drawn in question the validity of any Kentucky statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States, nor was there ever any title, right, privilege or immunity specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

Title 28, United States Code, §344(b) (Judicial Code, §237).

It follows, therefore, that this is not a case wherein this Court should grant the petition for a writ of certiorari.

We ask that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

LOUIS SEELBACH,
Counsel for Respondent.

BULLITT & MIDDLETON,
Of Counsel.